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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1628

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

**JACK SMITH, GILBERT SMITH, ARTHUR
SMITH and FRANCES SMITH,****Petitioners,**

v

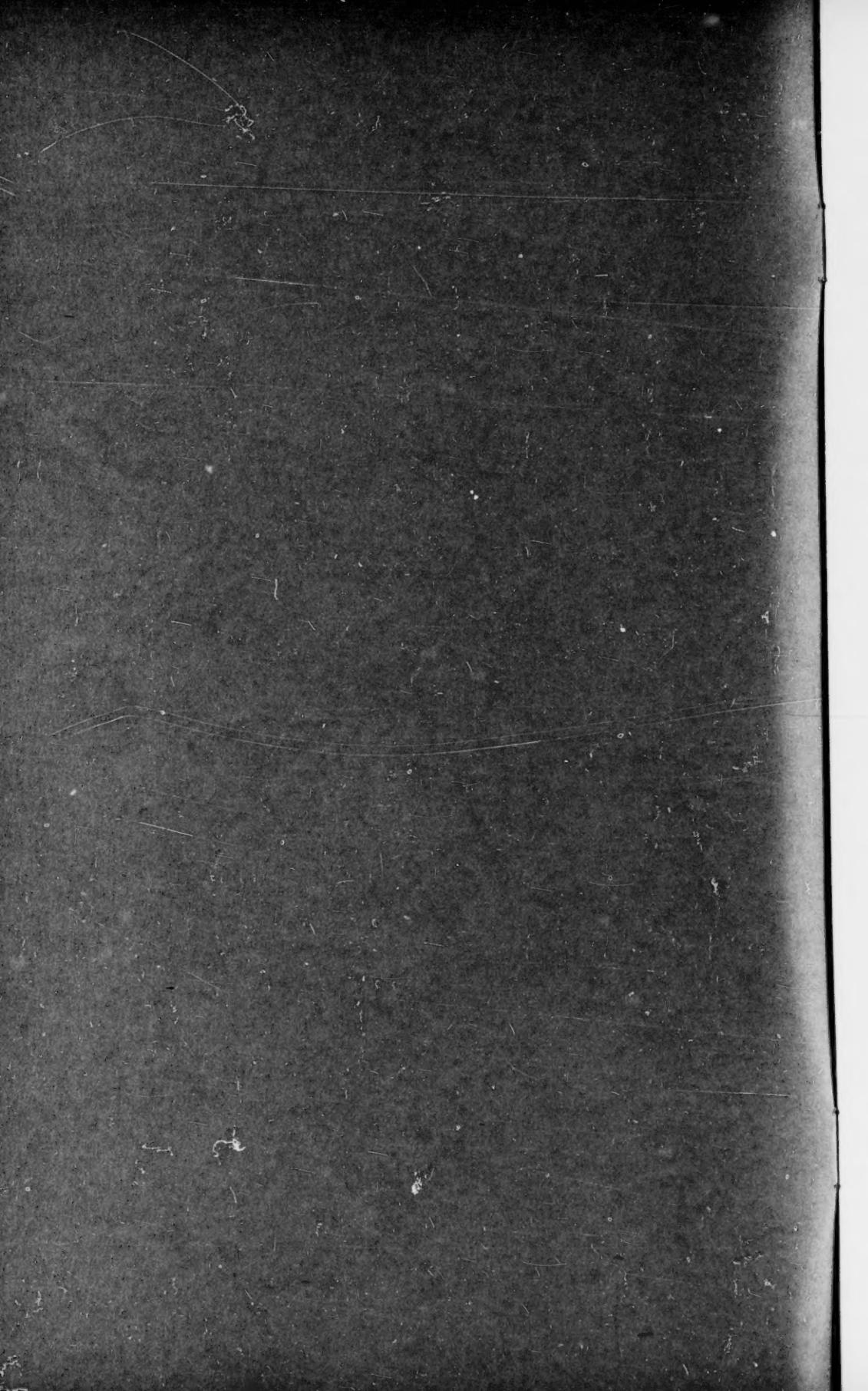
**STATE OF MICHIGAN, DEPARTMENT OF
TREASURY and ROBERT A. BOWMAN, State Treasurer,****Respondents.**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF MICHIGAN****RESPONDENTS' BRIEF IN OPPOSITION****FRANK J. KELLEY**

Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record
761 Law Building
Lansing, MI 48913
(517) 373-1124

Milton I. Firestone
George M. Elworth
Assistant Attorneys General



QUESTIONS PRESENTED

1. Whether Petitioners timely and properly raised federal questions in the state courts and whether those courts decided federal questions?
2. Where Petitioners' claims, based upon an unissued 1839 state tax stock certificate, were summarily dismissed by the state court because the statute of limitation had expired, is the judgment based upon an adequate and independent state ground, thereby precluding this Court's review?
3. Whether Petitioners were deprived of due process or equal protection in state court proceedings resulting in a judgment of summary disposition under Michigan court rules, statutes and decisions?

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**STATE OF MICHIGAN, DEPARTMENT OF
TREASURY and ROBERT A. BOWMAN, State Treasurer,**
Respondents.

OPINIONS BELOW

The opinion of Michigan Court of Claims (hereafter "Court of Claims"), granting Respondents' motion for summary disposition and dismissing Petitioners' complaint, was entered July 17, 1985 (Pet. App. E). Petitioners' motions for rehearing and other post-judgment relief were denied by order of the Court of Claims, dated September 17, 1985 (Pet. App. D).

The decision of the Court of Claims was affirmed by the Michigan Court of Appeals on July 1, 1987. The opinion is reported at 163 Mich App 178; 414 NW2d 374 (1987) (Pet. App. B).

On December 30, 1987, the highest court of the state, the Michigan Supreme Court, denied Petitioners' application for leave to appeal the decision of the Michigan Court of Appeals. See 429 Mich 888 (1987) (Pet. App. A).

The decision of the state court for which review by certiorari is being sought is that of the Michigan Court of Appeals. The Michigan Supreme Court has held (*Frishett v State Farm*

Mutual Auto Ins Co, 378 Mich 733, 734 [1966]) that where it enters an order denying leave to appeal, such action "imports no expression of opinion upon the merits of the case," citing this Court's decision in *US v Carver*, 260 US 482, 490 (1923), with respect to the effect of a denial of writ of certiorari by this Court.

Accordingly, the instant petition for a writ of certiorari should properly be treated as being directed to the Court of Appeals for the State of Michigan. See *Callender v Florida*, 383 US 270 (1966).

JURISDICTION

The jurisdiction of this Court has not been invoked because (1) Petitioners questions do not present federal issues, (2) Petitioners did not raise federal questions below, and (3) the Michigan courts, including the Michigan Court of Appeals, did not decide any federal questions in this case.

COUNTERSTATEMENT OF THE CASE

This case involves a claim against the State of Michigan for payment of an 1839 tax stock certificate (bond). The claim was summarily dismissed by the Court of Claims for two reasons. First, the applicable statute of limitation had long since expired. Second, there was no genuine issue of material fact, and the state was entitled to judgment as a matter of law in that Petitioners' Certificate No. 84 had never been issued and was cancelled (Pet. App. E).

The dismissal of Petitioners' claim was affirmed by the Michigan Court of Appeals on the basis of the expiration of the statute of limitation (Pet. App. B). The Michigan Supreme Court declined to grant Petitioners leave to appeal the decision of the Michigan Court of Appeals (Pet. App. A).

The record in this case is devoid of any indication that the Petitioners have raised any federal question. A careful reading of Petitioners' "Statement" shows that they do not even claim to have specifically asserted either due process or equal protection rights during the proceedings before the Court of Claims (Pet. pp 5-10). Petitioners assert that they raised the issue of due process in the Court of Appeals (Pet. p 9). Petitioners stated, as follows, on p 7 of their brief to the Michigan Court of Appeals, dated July 1, 1986:

"In addition, by denying the filing of the Amended Complaint, Appellants [Petitioners] have been significantly prejudiced by the limitation of certain arguments to be made to this Court, have lost legitimate claims against Appellees [Respondents] and have been deprived of due process of law."

Petitioners repeated this statement in their brief to the Michigan Supreme Court, at p 7, dated July 22, 1987. No authority was cited in support of this assertion. Neither of the indices to authorities for those briefs of Petitioners made any reference to either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. No reference to either due process or equal protection was made by the Petitioners in their "Statement of Questions Involved" in those briefs.

The 1839 bond issue is summarized in footnote 3 to the opinion of the Michigan Court of Appeals (Pet. App. B, pp 11-13). The certificates were essentially delinquent tax bonds. The proceeds of the 1839 issue were to be distributed to counties which had experienced revenue shortfalls on account of overdue property taxes. The state was to be reimbursed by the counties when the delinquent property taxes were finally collected. While the state hoped to sell \$100,000 of these bonds in denominations of \$1,000 each, only 31 bonds were sold. These bonds were not redeemed

on their stated date of maturity, July 15, 1842, due to a lack of funds; but all 31 bonds were redeemed by 1845. (See Pet. App. B, pp 8-9, for the wording of Certificate No. 84 concerning the amount owed, maturity date, interest rate, and coupons to be presented for payment of interest.)

Respondents located ten unissued certificates from the 1839 issue in the archives of the State of Michigan; and each had the signatures of the state officials, text, and coupons lined out in the same manner as Certificate No. 84. Their numbers were 32, 44, 45, 46, 49, 51, 81, 85, 87, and 91. The Court of Claims concluded that Respondents had not issued any certificates over No. 31 for the following reasons: (1) the state would not have issued the certificates from the 1839 bond issue out of sequence, (2) the state records showed that Certificates Nos. 1-31 were issued and redeemed, and the financial account of that activity was set forth in minute detail, and (3) there were no state records to show issuance of a certificate with a number higher than No. 31 (Pet. App. E, pp 22-28). In addition, the Court of Claims concluded that Certificate No. 84 had been cancelled when it stated:

“The color of the signature of the ink of the [State] Treasurer is different from the rest of the ink used, and I can’t imagine why anybody would line out the State Treasurer’s signature with another ink, or [the Auditor General] Mr. Howard’s signature for that matter, unless the purpose was to have some destructive value as to the documents.” (Pet. App. E, pp 30-31).

REASONS FOR DENYING THE WRIT

1. The questions presented are not federal questions.

Petitioners’ questions, while referring to “due process of law” and “equal protection of the law,” do not refer to the

U.S. Constitution. As such, Petitioners have failed to present questions for review under 28 USC 1257, which provides, in relevant part:

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

....

(3) By writ of certiorari...where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of...the United States.”

Bowe v Scott, 233 US 658, 665 (1914), held that if the constitution of the state in whose courts the case was heard has a due process clause, a claim that “due process” has been denied is deemed to refer to that clause in the state constitution:

“[I]t is settled that such an averment making no reference to the Constitution of the United States and asserting no express rights thereunder is solely referable to the state constitution, which in this instance has a due process clause, and affords no basis whatever for invoking the jurisdiction of this court.”

Due process and equal protection are provided for, as follows, in the Michigan Constitution of 1963:

“No person shall be denied the equal protection of the laws....” [Art 1, § 2.]

“No person shall...be deprived of life, liberty or property, without due process of law....” [Art 1, § 17.]

Since the questions presented do not raise federal issues, the petition should not be granted.

2. Petitioners' failure to present any federal claim to the Michigan courts precludes Petitioners from pursuing such claims in this Court.

No mention of any federal constitutional claim was made by Petitioners in the proceedings before the Court of Claims.

In *Webb v Webb*, 451 US 493, 496-497 (1981), this Court declined to assume that a reference to full faith and credit by a litigant in a state court proceeding was to the clause of that name in the U.S. Constitution when that litigant was attempting to seek the review of the case by way of certiorari. The only mention of due process in the Michigan appellate courts was by way of passing reference to the inability of Petitioners to amend their complaint. However, the phrase "due process" used by Petitioners was not tied to the U.S. Constitution.

Petitioners failed to argue any position regarding due process in the Michigan appellate courts, and they did not even mention equal protection at any level. Under Michigan law, failure to brief a question on appeal is tantamount to abandoning it. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

The lack of discussion of these topics by the Michigan Court of Appeals in its opinion in this case (Pet. App. B) also serves to demonstrate that Petitioners did not raise these issues on appeal. Indeed, according to *Webb v Webb*, 451 US 493, 495:

"This Court has frequently stated that when 'the highest state court has failed to passupon a federal question, it will be assumed that omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'"

Moreover, in their application for leave to appeal to the Michigan Supreme Court, Petitioners did not complain of a failure of the Michigan Court of Appeals to rule on issues of due process and equal protection.

Since the Michigan appellate courts did not decide the federal claims asserted here by Petitioners, none of the criteria listed in Rule 17 of the Supreme Court Rules for the granting of writs of certiorari have been met.

Since Petitioners have failed to show that their federal claims were adequately presented in the Michigan courts, the Petition should be rejected. *Webb v Webb*, 451 US 493, 501-502 (1981).

3. The summary dismissal of Petitioners' claims, based on an unissued 1839 state tax stock certificate because the statute of limitation had expired, is a judgment based on an adequate and independent state ground.

Klinger v Missouri, 80 US (13 Wall.) 257, 263 (1871), stated that where it appears that a state court bases its judgment on an adequate and independent state ground, this Court will not take jurisdiction of the case. Statutes of limitation were recognized as constitutional in *Atchafalaya Land Co v F. B. Williams Cypress Co*, 258 US 190, 197 (1922):

"The act of prescription was a proper exercise of sovereignty....They [statutes of limitation] do not necessarily lessen rights of property or impair the obligation of con-

tracts. Their requirement is that the rights and obligations be asserted within a prescribed time. If that be adequate, the requirement is legal, and its justice and wisdom have the testimony of the practices of the world."

The applicable 20-year Michigan statute of limitation was an adequate and independent basis for the dismissal of Petitioners' complaint by the Court of Claims, thereby precluding the claims of Petitioners from this Court's review. *Rogers v Jones*, 214 US 196, 204 (1909).

4. The proceedings of the Court of Claims did not deny Petitioners due process.

This Court has declared that the states enjoy wide latitude in establishing the rules governing the administration of their laws:

"Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out...and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " [Patterson v New York, 432 US 197, 201-202 (1977).]

The Court of Claims has exclusive jurisdiction to adjudicate contract and tort claims against the state and its agencies. MCL 600.6419; MSA 27A.6419. Cases in the Court of Claims are required by statute to be heard by a judge without a jury. MCL 600.6443; MSA 27A.6443. In general, the practices and procedures of the Court of Claims are the same as those prescribed for the circuit courts of general jurisdiction in this state. MCL 600.6422; MSA 27A.6422.

Since March 1, 1985, proceedings in the Court of Claims have been governed by the Michigan Court Rules of 1985 and prior to that date by the Michigan General Court Rules of 1963. The Court of Claims administration of this case, pursuant to those rules, provided due process to Petitioners by way of notice and an opportunity to be heard.

There were more than ten months between the filing of Petitioners' complaint in the Court of Claims on August 17, 1984 and the evidentiary hearing on June 26, 1985. During that time, Petitioners were entitled to conduct discovery under the court rules. The record is devoid of any restraint on Petitioners utilizing the usual discovery methods, such as interrogatories, depositions, and requests for production of documents.

Petitioners were informed of Respondents' defenses (1) through a motion filed on September 5, 1984 for accelerated judgment based on, among other things, statutes of limitation, and (2) through a supplemental brief filed on December 17, 1984 which outlined in detail (22 pages and affidavits of the State Archivist and State Documents Librarian) the history of the 1839 tax stock issue and included copies from the State Archives of ten unissued certificates from that issue, which like the Petitioners' Certificate No. 84, were higher than No. 31 and had their signatures, text, and coupons lined out in ink.

On June 26, 1985, an evidentiary hearing was held pursuant to notice from the Court of Claims. MCR 2.116(I)(3) authorizes a court to hold an immediate trial to resolve disputed issues of fact concerning a statute of limitation defense. Three witnesses were called by Respondents, and two witnesses were called by Petitioners. Nine exhibits were offered by Respondents, and eight were received by the court.

At the conclusion of the evidentiary hearing on June 26,

1985, the Court of Claims discussed with Petitioners' counsel his intention to review Respondents' hearing brief and afforded him an opportunity to make that review:

“THE COURT: All right. What type of argument do you desire?

“MR. DeBOER: I would like the opportunity to review it [Respondents' hearing brief] and file a responsive argument or brief, brief of that sort. I could go on for the next...30 minutes, but I don't know that I'm responding to everything in that and I would like to do that in writing.

“THE COURT: All right. I think what I will do, and you can call and verify tomorrow, is finish this matter then on Monday with any oral argument you desire. If you wish to file something by then, that's fine.” [Transcript, pp 89-90.]

Following the hearing, the Court of Claims granted Respondents' motion for summary disposition based on the statute of limitation having expired (Pet. App. C, p 18). The Court of Claims also concluded that Respondents were entitled to a judgment as a matter of law and that no genuine issues of material fact had been raised by Petitioners in opposition to the testimony and exhibits presented by Respondents establishing that Certificate No. 84 had never been issued and had ink lines drawn through it (Pet. App. E, pp 18-32).

Petitioners' motion for a rehearing was denied on September 17, 1985 (Pet. App. D). However, there is no due process right to a rehearing. *Pittsburgh C.C. & St. L. R. Co v Backus*, 154 US 421, 426-427 (1894).

It should be noted that Petitioners made no reference in their arguments to the Michigan appellate courts to a lack of opportunity for discovery or a lack of notice as to Respondents' legal position or defenses.

Regarding Petitioners' contention that they should have been permitted to amend their complaint, the Michigan Court of Appeals stated that the amendment would have been futile:

"Finally, plaintiffs' [Petitioners'] contention that they should be allowed to amend their complaint is without merit. Leave to amend a complaint is properly denied where the amendment would be futile. *Meyer v Hubbell*, 117 Mich App 699; 324 NW2d 139 (1982), *lv den* 417 Mich 993 (1983). Since plaintiffs [Petitioners] have made no effort to explain how their second amended complaint avoids the statute of limitation problems encountered by their first complaint, it is clear that the amendment would be futile and was properly disallowed." [Pet. App. B, pp 14-15.]

It should also be noted that Petitioners failed to obtain a ruling from the Court of Claims on their motion for leave to file an amended complaint. Their motion was filed on August 6, 1985 with a notice of hearing for November 26, 1985. The record shows no action, after August 6, 1985, by Petitioners to obtain a ruling from the Court of Claims on this issue.

In light of the foregoing, it should be concluded that Petitioners' claims of denials of due process are without merit.

5. The dismissal of Petitioners' claim by the Court of Claims, as being time-barred, was not a denial of equal protection.

Missouri Pacific R. Co v Larabee, 234 US 459, 474 (1914), stated that the Equal Protection Clause of the Fourteenth Amendment

“was not intended to deprive the States of their power to establish and regulate judicial proceedings and that its provisions therefore only restrain acts which so transcend the limits of classification as to cause them to conflict with the fundamental conceptions of just and equal legislation....”

In *Ellis v Dixon*, 349 US 458, 460 (1955), a writ of certiorari was dismissed as improvidently granted when petitioners had failed to allege in their pleadings with respect to a claim under the Equal Protection Clause of the Fourteenth Amendment how they were being treated differently from other organizations of a similar character. Similarly, Petitioners have failed to demonstrate that the statute of limitation and case law regarding the commencement of a statute of limitation have been applied to them in a manner different from other Michigan litigants.

The Michigan Court of Appeals carefully considered the function of a statute of limitation in barring stale claims and demonstrated in its opinion that the applicable statute of limitation began to run by 1845, thereby expiring twenty years later in 1865 (Pet. App. B, pp 6-11, 14).

Petitioners cite several cases, for the first time in this litigation, referring to commencement of the running of the statute of limitation where certificates of indebtedness, generally warrants, are payable out of a special fund. However, those cases are inapplicable because a reading of Certificate

No. 84 shows that the obligation was not payable out of a specific fund. The certificate's language contained a promise to pay \$1,000 on July 15, 1842, along with the promise to pay semiannual interest coupons as they became due and were presented over a three-year period. (See Pet. App. B, pp 8-9, for the wording of the certificate.) As noted in *Flushing Nat'l Bank v Municipal Assistance Corp*, 40 NY2d 731, 735; 390 NYS2d 22, 358 NE2d 848 (1976), the effect of a pledge of full faith and credit is not to create a lien upon the unspecified revenues of the obligor not therein specifically obligated to payment of such bonds, but is to acknowledge an indebtedness for the amount of money received as consideration for the bonds, which indebtedness is enforceable in an ordinary action.

Petitioners' argument that Respondent State of Michigan should be required to call Certificate No. 84 as a condition precedent to the commencement of the statute of limitation, is at odds with both the law applied by the Michigan courts and the facts. The result sought by Petitioners would (1) impose a call procedure on Certificate No. 84 even though none is set forth therein, (2) require the state to call unknown certificates from unknown parties, since the state had no record of issuing Certificate No. 84 nor a record of a holder of that certificate, and (3) permit the holder of certificates to wait indefinitely prior to filing claims against the state.

Petitioners have failed to show how the treatment of their claim by the Court of Claims discriminated against them. The claim of Petitioners regarding equal protection is without merit and should be rejected.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK J. KELLEY

Attorney General

Louis J. Caruso
Solicitor General
Counsel of Record
761 Law Building
Lansing, MI 48913
(517) 373-1124

Milton I. Firestone
George M. Elworth
Assistant Attorneys General

Dated: April 28, 1988

